

REMARKS

A. Introduction

Claims 1-21 were presented for examination.

Examiner objected to Claims 5-11 and 13-16.

Claims 1-21 were rejected.

Claims 2 and 9 had already been cancelled.

B. Introductory Remarks

In response to Examiner's final Office Action dated December 29, 2004, the undersigned attorney initiated a telephone conference with Examiner which occurred on January 27, 2005 at 10:00 a.m. CMT. The undersigned attorney pointed out discrepancies between Examiner's December 29, 2004 Final Office Action and her previous Office Action dated August 18, 2004. One such discrepancy was that Examiner mistakenly included Claim 3 in a § 103 rejection in the December 29, 2004 Office Action, but in her previous Office Action dated August 18, 2004, she had rejected Claim 3 under § 102. Examiner admitted this was a mistake.

Regarding U.S. Patent No. 6,458,388 to Genis et al (Genis), Examiner indicated that her position was that the limitation "all-natural carrier medium" in Claim 3 in the present invention read on both aqueous and non-aqueous phases. Examiner indicated that in order to overcome the Genis reference, Applicants needed to include the term "anhydrous" in their claims. Further, Examiner suggested amending the "all-natural carrier medium" limitation in Claim 3 to read "all-natural carrier medium being an oil."

Regarding EP 1074245 (EP '245), Examiner readily admitted that this reference did not teach high concentrations of Dead Sea salt. Examiner also indicated that Applicants would be able to overcome the EP '245 reference simply by amending their claim to reflect "50% by

weight of total composition.” Examiner’s position was that, although Applicants’ specification supported the inclusion of more than 50% processed ultra fine Dead Sea mineral salts, the claims did not. Amending the claims in this way, Examiner contended, would overcome the EP ‘245 reference. Having overcome Genis and EP ‘245, U.S. Patent No. 5,997,889 to Durr et al (the Durr reference) automatically disappeared.

Finally, Examiner requested Applicants submit comparative data in support of Applicants’ claims. Specifically, Examiner requested comparison studies between two compositions: (i) using an aqueous medium, (ii) the other, using a non-aqueous medium (oil based).

Because the December 29, 2004 Office Action was a Final Office Action, Examiner indicated Applicants would need to file a Request for Continued Examination (RCE) with their Response, incorporating Examiner’s suggestions. Applicants did as Examiner suggested. However, despite Applicants’ full compliance, Examiner continues to maintain her rejections.

C. Claim Objections

Examiner objected to Claims 5-11 contending that these claims recite a different carrier medium and improperly depend on the preceding claim, whereas the generic limitation “all-natural carrier medium” is present in Claim 3. (Page 2). Examiner further contends that Claims 13-16 recite a specific essential oil and should be dependent upon Claim 12, instead of the preceding claims. (Page 2). Applicants respectfully disagree.

The claims as written are proper. A series of singular dependent claims is permissible in which a dependent claim refers to a preceding claim which, in turn, refers to another preceding claim. See Manual of Patent Examining Procedure (M.P.E.P.) § 608.01 (n)(emphasis added). Further, Applicants’ use of the transitional term “comprising,” which is synonymous with

“including,” “containing,” or “characterized by,” is inclusive or open-ended and does not exclude additional, unrecited elements or method steps. See M.P.E.P. § 2111.03. See also *Mars Inc. v. H.J. Heinz Co.*, 377 F.3d 1369, 1376, 71 U.S.P.Q.2d 1837, 1843 (Fed.Cir. 2004) (“like the term ‘comprising,’ the terms ‘containing’ and ‘mixture’ are open ended.”).

Contrary to Examiner’s contention that Claims 5-11 recite a different carrier medium, Claims 5-11 merely give additional constituents of the “all-natural carrier medium being an oil” limitation of Claim 3. For example, Claim 5 provides the limitation of “all-natural carrier medium comprises soybean oil,” which, like “palm oil” (Claim 4), is a further limitation of Claim 3. Further, the “all-natural carrier medium comprises olive oil” limitation in Claim 6 also includes “soybean oil” (Claim 5) and “palm oil” (Claim 4); again further limiting the “all-natural carrier medium being an oil” in Claim 3.

Following this process to its logical conclusion, the all-natural carrier medium comprises “coconut oil” (Claim 11), “cashew husk oil ethoxylate” (Claim 10), “jojoba wax” (Claim 9), “beeswax” (Claim 8), “jojoba oil” (Claim 7), “olive oil” (Claim 6), “soybean oil” (Claim 5), and “palm oil” (Claim 4), each one providing a further limitation of the “all-natural carrier medium” recited in Claim 3.

Similarly, Examiner contends Claims 13-16 recite a specific essential oil and should be dependent upon Claim 12 instead of the preceding claims. Following the same reasoning as just described above, the “essential oil blend” described in Claim 12 is comprised of “calendula” (Claim 16), “chamomile” (Claim 15), “rosewood” (Claim 14), and “lavender” (Claim 13). All of these essential oils are blended together and further limit the “essential oil blend” as described in Claim 12.

Examiner's suggestion to correct Claims 5-11 to depend from Claim 3 and Claims 13-16 to depend from Claim 12 would effectively broaden these claims unnecessarily. Examiner's recitation of M.P.E.P. § 608.01 (n) as well as the open-ended meaning of the transitional term "comprising" make clear that the claims as written are in proper form. Examiner's objections were unnecessary and improper.

D. Claims 1-21 Rejected Under 35 U.S.C. § 112

Examiner rejected Claims 1-21 under 35 U.S.C. § 112, first paragraph, as failing to comply with the written description requirement (Page 3). Specifically, Examiner contends that these claims recite a new limitation "anhydrous," which constitutes new matter not supported by the specification. As a preliminary matter, it is to be noted that Claim 2 and Claim 19 were cancelled and thus these rejections do not apply to those claims. Applicant respectfully disagrees with Examiner's rejections.

To satisfy the written description requirement, a patent specification must describe the claimed invention in sufficient detail that one skilled in the art can reasonably conclude that the inventor had possession of the claimed invention. *Moba, B.V. v. Diamond Automation, Inc.*, 325 F.3d 1306, 1319, 66 U.S.P.Q.2d 1429, 1438 (Fed. Cir. 2003); see also M.P.E.P. § 2163(I). An applicant shows possession of a claimed invention by describing the claimed invention with all of its limitations using such descriptive means as words, structures, figures, diagrams, and formulas that fully set forth the claimed invention. *Lockwood v. American Airlines, Inc.*, 107 F.3d 1565, 1572, 41 U.S.P.Q.2d 1961, 1966 (Fed.Cir. 1997); M.P.E.P. § 2163(I). While there is no *in haec verba* requirement, newly added claim limitations must be supported in the specification through express, implicit, or inherent disclosure. M.P.E.P. § 2163(I)(B).

Amendments to an application which are supported in the original description are NOT new matter. M.P.E.P. § 2163.07.

A description as filed is presumed to be adequate, unless or until sufficient evidence or reasoning to the contrary has been presented by the examiner to rebut the presumption. M.P.E.P. § 2163 (III)(A). The examiner, therefore, must have a reasonable basis to challenge the adequacy of the written description. The examiner has the initial burden of presenting by preponderance of evidence why a person skilled in the art will not recognize in an applicant's disclosure a description of the invention defined by the claims. *In re Wertheim*, 541 F.2d 257, 263, 191 U.S.P.Q. 90, 97 (C.C.P.A. 1976); M.P.E.P. § 2163 (III)(A).

Examiner contends that a careful review of the instant disclosure does not reveal any support for the claimed anhydrous composition. However, a more careful review of the specification clearly demonstrates that there are several references in support of the claimed composition being anhydrous. As show below, Examiner failed to have a reasonable basis to challenge the adequacy of the written description.

Perhaps the most obvious indication that "anhydrous" does not constitute new matter is that in no step in the process or in the composition is water added to the composition. Additionally, the specification includes filters specifically for the removal of moisture (Page 14, line 11; see also Fig. 2) and a cover to prevent moisture from mixing with the ultra fine minerals (Page 14, lines 18-21; see also Fig. 2). The specification then continues to describe the highly hygroscopic (*i.e.*, readily taking up and retaining moisture) nature of both the Dead Sea minerals and the ultra fine processed minerals, thus requiring the entire process to incur in a modified room atmosphere with a temperature no higher than 78 degrees Fahrenheit with cool, dry positive pressure. (Page 15, lines 11-14).

Further, the air used during the process of the present invention is required to pass through a water trap. (Page 17, line 9; see also Fig. 3). Further still, Applicants clearly disclosed the final Dead Sea mineral composition as containing ultra fine Dead Sea minerals, palm oil, soybean oil, olive oil, jojoba oil, beeswax, essential oil blend (including rosewood, lavender, chamomile and calendula), jojoba wax, PEG-120, cashew husk oil ethoxylate, coconut oil, natural source Vitamin E oil (or d-alpha tocopherol), and Vitamin E oil (or natural mixed tocopherols). (Page 19, line 14-20). The numerous references in support of the anhydrous limitation clearly demonstrate in sufficient detail that one skilled in the art can reasonably conclude that Applicants had possession of the claimed invention.

Moreover, Applicants described in exhaustive detail in their Response to Office Action of August 18, 2004, incorporated by reference herein, how Genis' use of an oil-water base composition was distinct from the present invention, an entirely anhydrous composition which utilizes an oil base. In Examiner's December 29, 2004 Office Action, Examiner recognized the "oil-base carrier medium" versus an "oil and water emulsion," but maintained her rejection because the "instant claims do not recite that the composition is anhydrous." (Page 4). Examiner also subsequently indicated in the January 27, 2005 telephonic conference, that, in order to overcome the Genis reference, Applicants needed to include the term "anhydrous" in their claims.

The absence of the addition of water, the abundance of references in the specification emphasizing the importance of a water-free environment, the contents of the final Dead Sea mineral composition, and Examiner's prior Office Action and statements during a telephonic conference provide clear and ample support for the claimed "anhydrous" composition. Examiner simply failed to set forth facts supporting the lack of written description conclusion. Therefore,

amending Claims 1, 3-18, and 20-21 to recite the “anhydrous” limitation does not offend the prohibition against the introduction of new matter and thus complies with the written description requirement of the first paragraph of 35 U.S.C. § 112. Examiner improperly rejected Claims 1, 3-18, and 20-21.

E. Claims 1-3, and 17-21 Rejected Under 35 U.S.C. § 103

Examiner rejects Claims 1-3, and 17-21 under 35 U.S.C. § 103(a) as being unpatentable over KR 149428 to Lee (KR) in view of U.S. Patent No. 6,458,388 to Genis et al. (Genis) or Genis in view of KR. As a preliminary matter, Claims 2 and 19 were cancelled. Thus, this section focuses on Claims 1, 3, 17, 18, 20, and 21. Further, Applications’ Response to Office Action of August 18, 2004 and Applicants’ Response to Office Action of December 29, 2004, are incorporated by reference herein. Applicants respectfully disagree with Examiner’s rejections.

Examiner bears the initial burden of establishing a *prima facie* case of obviousness. To establish a *prima facie* case of obviousness, three basic criteria must be met. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. Second, there must be some reasonable expectation of success. Finally, the prior art reference (or references when combined) must teach or suggest all the claim limitations. The teaching or suggestion to make the claimed combination and the reasonable expectation of success must both be found in the prior art and not be based on applicant’s disclosure. Manual of Patent Examining Procedure (M.P.E.P. § 2142); *In re Vaeck*, 947 F.2d 488 (Fed. Cir. 1991). Examiner failed to establish a *prima facie* case of obviousness.

1. Teaching or Suggestion of All Claim Limitations

To establish *prima facie* obviousness of a claimed invention, all the claimed limitations must be taught or suggested by the prior art. M.P.E.P. § 2143.03. If an independent claim is nonobvious under 35 U.S.C. 103, then any claim depending therefrom is nonobvious. *In re Fine*, 837 F.2d 1071, U.S.P.Q.2d 1596 (Fed.Cir. 1998); M.P.E.P. § 2143.03.

KR discloses a cosmetic composition comprising 15-85% by weight of bay salt, Dead Sea salt, or bamboo salt. However, while KR discloses a particle size in the range of 0.01 mm-5.0 mm, no indication is given as to which one of the three salts is used as a given particle size. It may be possible to have a particle size of 0.01 mm of, for example, bay salt or bamboo salt. However, if Dead Sea salts were used, then the particle size would necessarily be in the range of either 90% less than 1.7 mm or greater than 90% between 1.7 mm and 4.0 mm size granularity, as those are the particle sizes of the two standard grades of native Dead Sea mineral particles that are commercially available, as indicated in the present invention. (Specification, Page 13, lines 8-13).

There is also no indication in KR that any sort of processing occurs prior to using the salts in the composition. In contrast, the Dead Sea salts in the present invention undergo a vigorous particle size reduction process which eliminates impurities, leaving ultra fine minerals that are essentially “rock-free.” (Specification, Page 12, line 9 through Page 13, line 3). Indeed, Applicants have already received two (2) patents (U.S. Patent No. 6,607,151, August 19, 2003, and U.S. Patent No. 6,871,805, March 29, 2005) relating to the processing of Dead Sea minerals.

Therefore, although the range disclosed is between 0.01 mm – 5.0 mm, without the present invention, particle sizes of 100% less than 10 mesh and 100% less than 1.0 mm cannot be achieved when dealing with Dead Sea salts. Thus, KR fails to teach the limitation of “at least

50% by weight of total composition of processed Dead Sea mineral particles,” as recited in Independent Claim 1.

KR also does not teach the limitation “processed Dead Sea minerals in a continuous all-natural carrier medium being an oil,” as recited in Claim 3. KR instead teaches a medium being a polyol. (see below).

Contrary to Examiner’s contention that KR does not teach the steps of heating and cooling, KR discloses the following:

To produce products of examples, the surfactant phase was added to the polyol phase and was homogeneously dissolved by heating at 60 ~ 70°C. To the mixture, the oil phase with room temperature was slowly added while the mixture was stirred in a homomixer at 4,000 ~ 6,000 rpm for 5 ~ 10 minutes. After cooling, salt was added by spraying salt by using peddler mixer at 10 ~ 30 rpm to produce the products. (Page 5).

As evident from this limited disclosure, while KR teaches generic heating and cooling steps, KR fails to teach the limitation “the step of cooling said processed vessel after said heating step wherein said cooling step occurs at a rate of at least 200 gallons in about 2 hours or less,” as recited in Claim 18, or the limitation “the step of cooling said processed vessel to about 42 degrees Celsius,” as recited in Claim 20, or the limitation “the step of cooling said processed vessel to about 42 degrees Celsius,” as recited in Claim 21. These limitations are nowhere to be found in the KR reference.

2 Non-Analogous Art

To rely on references under 35 U.S.C. § 103, the references must be analogous prior art. M.P.E.P. § 2141.01(a). In order to rely on a reference as a basis for a rejection of an applicant’s invention, the reference must be either in the field of applicant’s endeavor or, if not, then be

reasonably pertinent to the particular problem with which the inventor was concerned. *In re Oetiker*, 977 F.2d 1443 (Fed. Cir. 1992).

When comparing Genis and KR with the present invention, Examiner simply fails to recognize the general rule of chemistry that “like dissolves like”. Genis teaches a cosmetic composition based on an emulsion of oil and water. (Col. 3, lines 24-26). Water is highly polar and readily dissociates salts into their respective ions. High concentrations of Dead Sea minerals are not achievable because the high concentrations of divalent cations, such as magnesium and calcium, as compared with monovalent cations, such as sodium and potassium, and the high ionic strength of a solution of Dead Sea minerals have a tremendous negative effect on the formation and stability of dispersions and emulsions, and strictly limit concentrations of Dead Sea minerals to a few percent of the weight of conventional cosmetic formulations. (See KOTTEK, SAMUEL S., THE DEAD SEA: A SOURCE OF LIFE; ISRAEL JOURNAL OF MEDICAL SCIENCES; vol. 32, No. 7, Supplement, July 1996, p.31). Such was the case in Genis which limited its contents of the Dead Sea salts as mineral solutes in the aqueous solution, comprising approximately 5.86% of the cosmetic cream. (Col. 4, Table 2).

KR teaches an oil-in-polyol emulsion that uses oil and polyol as a polar solvent. (Page 3). A polyol, also known as a sugar alcohol, is a hydrogenated form of carbohydrate, whose carbonyl group has been reduced to a primary or secondary hydroxyl group. In other words, a polyol is a hydrocarbon with a number of alcohol functional groups. While technically water-free, the hydroxyl group functions almost like water. While the hydrocarbon backbone of a polyol would ordinarily not dissociate the salt into its respective ions, it is the presence of these strong electron-pulling hydroxyl groups that dissociate and pull the salts into solution. The more hydroxyl groups present, the greater the electron affinity, the more the polyol behaves like water.

In contrast, on the other side of the spectrum is the present invention. The present invention uses oil as its all-natural carrier medium and continuous phase. This oil is both anhydrous and non-polar. Unlike a medium with water (Genis) or water-like qualities (KR), there are no electron-pulling characteristics in oil. The highly ionic Dead Sea minerals cannot be dissolved in oil. Like dissolves like. The minerals are in suspension and remain so in granular form due to the present invention's novel technique of fractionalization of the Dead Sea minerals into an ultra fine mineral compound. (Specification, Page 12, lines 9-21). Just as regular table salt will remain in granular form when placed into cooking oil, so too do the Dead Sea minerals remain in their granular form when placed into the all-natural carrier medium oil of the present invention.

Clearly, the difference between the water in Genis and the polyol in KR, on the one hand, and the all-natural carrier medium oil in the present invention, on the other hand, is a distinguishable feature between the present invention and the two cited references. Genis and KR are simply not analogous to the present invention.

Furthermore, it is clear that KR emphasizes bamboo salt. Although KR recites Dead Sea salt, bay salt, and bamboo salt, the entire patent predominantly discusses bamboo salt. Indeed, bamboo salt, not Dead Sea salts, was what was tested and used in KR's comparative analysis. (See Tables 1-6). This is crucial as the composition of Dead Sea minerals is very unique. (Specification Page 7, line 21- Page 8, line 1). Dead Sea salts clearly do not have the same chemical composition as the other salts, including bay salt and bamboo salt. Therefore, KR fails entirely to provide adequate disclosures regarding the subject pertaining to Dead Sea minerals, providing further confirmation that KR is not analogous to the present invention.

3. No Suggestion to Combine

Genis teaches a composition based on an emulsion of oil and water. (Col. 3, lines 24-26). Nowhere in Genis is there any suggestion to dramatically increase the concentration of Dead Sea salts in a cosmetic composition that utilizes water. Indeed this cannot be done and Examiner fails to point to any reference to the contrary. Further, KR actually teaches away this concept as it recognized that “[o]il-in-water or Water-in-oil emulsion that utilizes water generally has a drawback that salt cannot be used in large quantity because the dissociation of salt significantly reduces the solubility of a surfactant.” (Page 3).

Further, KR’s comparative study was a comparison of its polyol based composition with that of “conventional water-in-oil or oil-in-water in emulsions,” (Page 9), *i.e.*, Genis. Additionally, KR teaches away from using the same methods of preparation that is used in preparing an oil-in-water emulsion. Specifically, KR indicates that the comparative examples, *i.e.*, the oil and water based products, “were prepared according to a conventional method for preparing an oil-in-water emulsion.” (Page 5). Therefore, there is simply no suggestion in KR to combine either its increased level of Dead Sea salts in a polyol based emulsion or its distinct method of preparation with an oil-in-water based emulsion of low concentrations of Dead Sea salts and conventional method for preparation of same in Genis to come up with the present invention.

Concerning the Genis reference, Examiner summarily dismissed all of Applicants’ arguments with respect to Claims 1-21 as being moot in view of the new ground(s) of rejection. (Page 8). However, it is apparent that only one new ground of rejection, the KR reference, was given. All other rejections were simply recitations (almost verbatim) of prior rejections in Examiner’s August 18, 2004 Office Action (see Pages 3-5).

Examiner further contends that the instant claims recite at least 50% processed, but does not state if 50% is pertaining to the concentration of Dead Sea salts in the composition. (Page 4). This contention was directly addressed in Applicants' Response to Office Action of August 18, 2004, as well as in Applicants' Response to Office Action of December 29, 2004 wherein Applicants amended their claims to add the limitation "at least 50% by weight of total composition of processed Dead Sea mineral particles" pursuant to Examiner's suggestion in her December 29, 2004 Final Office Action and Examiner's suggestion of same during a telephonic conference with the undersigned.

While both KR and Genis may teach compositions containing Dead Sea salts for achieving the same cosmetic effect, *i.e.*, as a scrub for messaging skin, as Examiner contends, both these references do so in ways that are quite distinct from the present invention, as discussed above. Therefore, it simply would not have been obvious for one of ordinary skill in the art at the time of the present invention to use a higher concentration of Dead Sea salts in KR with the composition of Genis.

Factors that may be considered in determining level of ordinary skill in the art include: (1) the educational level of the inventor; (2) type of problems encountered in the art; (3) prior art solutions to those problems; (4) rapidity with which innovations are made; (5) sophistication of the technology; and (6) educational level of active workers in the field. M.P.E.P. § 2141.03; see also *Environmental Designs, Ltd. v. Union Oil Co.*, 713 F.2d 693, 696, 218 U.S.P.Q. 865, 868 (Fed.Cir. 1983), *cert. denied*, 464 U.S.1043 (1984). The "hypothetical 'person having ordinary skill in the art' to which the claimed subject matter pertains would, of necessity have the capability of understanding the scientific and engineering principles applicable to the pertinent art." M.P.E.P. § 2141.03.

A problem that had plagued the cosmetic industry until the present invention was how to fractionalize Dead Sea bath salt compounds in order to dramatically increase and maintain significantly high concentration of Dead Sea mineral particles in a stable all-natural suspension. Researchers across the cosmetic field with various educational levels and backgrounds have been unable to solve this dilemma.

It is clear that the process of fractionalizing Dead Sea mineral particles to a granularity size of 100% less than 1.0 mm in order to dramatically increase the concentration of Dead Sea mineral particles to at least 50% by weight of total composition in an all-natural carrier medium being an oil is simply not found anywhere in the cosmetic industry. This and this alone should be sufficient to overcome any of Examiner's objections or rejections to the present invention.

With all due respect, Examiner will be hard pressed to find the present invention disclosed in any literature as no entity has been able to accomplish what the present invention discloses. Therefore, the present invention is not obvious in light of either Genis in view of KR or in view of KR in view of Genis. Examiner's rejections were improper.

Equally clear is that the cosmetic composition in Genis is quite distinct from the cosmetic composition in KR. Thus, *a fortiori*, the process used to prepare the Genis composition inherently differs from the process used to prepare the KR composition. Therefore, contrary to Examiner's contention, it would not have been obvious to one of ordinary skill in the art at the time of the present invention to employ the process steps of Genis to prepare the composition of KR or to further optimize the temperature range or exact temperatures of heating and cooling cycles, such that a homogenized cream containing Dead Sea salt granules would be stable upon storage and achieve the desired skin scrubbing effect. Examiner's rejections are misguided and improper.

F. Claims 12-16 Rejected Under 35 U.S.C. § 103

Examiner rejects Claims 12-16 under 35 U.S.C. § 103(a) as being unpatentable over KR 149428 to Lee (KR) in view of U.S. Patent No. 6,458,388 to Genis et al. (Genis) as applied to claims 1-3 and 17-21 in view of EP 1074245 (EP '245). Again, Applicants note that Claims 2 and 19 were cancelled. Further, in Examiner's December 29, 2004 Office Action, Claim 14 was not rejected and thus was presumed to be allowed. However, as Examiner now included Claim 14 in her rejection, Applicants will address Claims 12-16. Applicants respectfully disagree with Examiner's rejection of Claims 12-16 and incorporate their Response to Office Action Dated August 18, 2004 by reference herein in response thereto.

Applicants further submit that they have overcome all obviousness rejections against Independent Claim 1 under 35 U.S.C. § 103 asserted by Examiner. As dependent Claims 12-16 ultimately depend from Independent Claim 1, Applicants respectfully submit that these claims are nonobvious as well. MPEP § 2143.03; *In re Fine*, 832 F.2d 1071; 5 U.S.P.Q. 2d 1596 (Fed. Cir. 1988).

G. Claims 4-11 Rejected under 35 U.S.C. § 103

Examiner rejected Claims 4-11 under 35 U.S.C. 103 (a) as being unpatentable over KR 149428 to Lee (KR) in view of U.S. Patent No. 6,458,388 to Genis et al (Genis), as applied to Claims 1-3 and 17-21 in view of U.S. Patent No. 5,997,889 to Durr et al (Durr). Examiner's previous Office Actions (August 18, 2004 and December 29, 2004) previously included EP 1074245 (EP '245) as a basis for rejecting Claims 4-11. However, Examiner does not cite EP '245 as a basis for rejection in her latest Office Action of July 22, 2005. It is presumed by the omission of the EP '245 reference in rejecting now Claims 4-11, that the EP '245 reference has

been overcome. However, as to Examiner's other rejections, Applicants incorporate by reference their response to Office Action dated August 18, 2004 herein and respectfully disagree.

Applicants further submit that they have overcome any obviousness rejections against Independent Claim 1 under 35 U.S.C. § 103 asserted by Examiner. As Claims 4-11 ultimately depend from Independent Claim 1, Applicants respectfully submit that these claims are nonobvious as well. M.P.E.P. § 2143.03; *In re Fine*, 837 F.2d 1071, 5 U.S.P.Q.2d 1596 (Fed.Cir. 1988).

H. Applicants' Reply to Examiner's Response to Arguments

Examiner contends that the unexpected results and the Declaration of Terrance C. Clifford submitted pursuant to 37 C.F.R. § 1.132 were not persuasive. Examiner further contends new grounds of rejection. Examiner further contends that a careful consideration of the unexpected results reveals that the results presented are not commensurate with the scope of the instant claims. Applicants respectfully disagree.

Examiner cites only one additional reference, the KR reference. This additional reference is ambiguous at best and teaches away from the present invention as described above.

Examiner acknowledges that a concentration of 55% "still meets the claimed 'at least 50%.'" However, Examiner continues by stating "the immediate effect on skin is not as intended, although the feel is acceptable, and also the suspension obtained is over thick with too much salts to feel." (Page 8).

Examiner completely misses the obvious. At a concentration of 55% Dead Sea salts, all of the processed Dead Sea salts remains in suspension with no separation. This is clearly indicated in the results portion of Experiment 5. It is undeniable that the comparison data accompanying the Declaration unequivocally demonstrates a cosmetic composition comprising

at least 50% by weight of total composition of processed Dead Sea mineral particles, having a size of less than about 10 mesh and stably suspended in an all-natural medium carrier.

Examiner also gives no basis for her “observation” that “the feel, appearance, and the ability to remain in suspension without separation and finally the best intended effect on the skin” is a “function of the concentration of soybean oil and beeswax at a concentration of 9% and 3% respectively (experiment 10).” (Page 8). Other experiments showing the same percentage of soybean oil and beeswax as in Experiment 10 are as follows:

- Experiment 5 shows soybean oil at 9.0 %.
- Experiments 4 and 5 also show beeswax at 3.0%.

The qualitative characteristics noted by the Examiner in Experiment 10 cannot be attributed solely to the concentrations of soybean oil and beeswax oil. All the ingredients together play a role in the overall feel, appearance, and ability of the Dead Sea salts to remain in suspension without separation. Therefore, the Declaration is commensurate with the claimed invention.

Finally, as clearly shown in all experiments wherein the processed ultra fine Dead Sea minerals comprised at least 50% of the composition (Experiments 4-10), all Dead Sea salt minerals remained in suspension. (only Experiment 4 exhibited slight separation). Therefore, consistent results occur over the entire claim range of at least 50%. See M.P.E.P. 716.02(d); see also *In re Clemens*, 622 F.2d 1029, 1036, 206 U.S.P.Q. 289, 296 (C.C.P.A. 1980).

CONCLUSION

In view of the above, Applicants submit that Claims 1, 3-18, 20, and 21 are in condition for allowance. Applicants respectfully request reconsideration and withdrawal of the rejections and objections. Allowance of Claims 1, 3-18, 20, and 21 at an early date is solicited.

If Examiner still finds impediments to allow Claims 1, 3-18, 20, and 21 and, in the opinion of the Examiner, a telephone conference between the undersigned and Examiner would help remove such impediments, the undersigned respectfully requests such a telephone conference.

Respectfully submitted,

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